

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Telephone Number Portability)	
)	CC Docket No. 95-116
Petition of the North-Eastern)	
Pennsylvania Telephone Company)	
for Temporary Waiver of the)	
Commission's Number Portability)	
Requirements)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these comments opposing the Petition for Waiver of the Federal Communications Commission's ("Commission") May 24, 2004 deadline for carriers to implement wireline-to-wireless local number portability ("LNP") upon receiving a request from a commercial mobile radio service ("CMRS") provider filed by North-Eastern Pennsylvania Telephone Company ("NEP" or "Petitioner").¹ For the reasons set forth below, the Commission should deny the waiver request and reaffirm that all carriers, including the Petitioner, have an obligation to port telephone numbers to other carriers as of May 24, 2004.²

I. INTRODUCTION.

Nextel is one of several commercial wireless providers that, through subsidiaries, offers a range of valuable digital wireless services in its licensed markets nationwide. Under the terms of Commission orders and rules, Nextel and other Commercial Mobile Radio Service ("CMRS")

¹ North-Eastern Pennsylvania Telephone Company, Petition for Waiver, CC Docket No. 95-116 (filed March 23, 2004) ("Petition"). See Wireline Competition Bureau Seeks Comment on the Petition of the North-Eastern Pennsylvania Telephone Company for Temporary Waiver of the Commission's Number Portability Requirements, *Public Notice*, CC Docket No. 95-116, DA 04-798 (rel. March 26, 2004).

² NEP is a rural ILEC providing service in portions of Susquehanna, Wayne and Lackawanna counties in northeastern Pennsylvania. NEP requests Commission approval of a different implementation date – **in some cases until December 2005** – for each of its exchanges.

carriers have been required to allow customers to port their numbers out and accept new customers with numbers to be ported-in since November 24, 2003. *This number porting requirement originally was established by the Commission in 1996.*³ Most recently in its *Intermodal Porting Order*, the Commission re-affirmed that **all** carriers have preexisting obligation to port numbers.⁴

Since the LNP obligation's inception, Nextel and other carriers have prepared their networks, systems and personnel to honor the Commission's local number portability rules. Notably, the FCC makes no distinction in its rules between the porting of numbers among wireless carriers and the porting of numbers between a wireless carrier and a rural ILEC and Nextel implemented LNP with both wireless and wireline carriers through the FCC's specified *bona fide* request process. In fact, at the time it adopted LNP obligations for wireless carriers, the Commission cited the potential for intermodal competition as the driving public interest reason for requiring CMRS carriers to implement LNP at all.⁵ And the FCC has reaffirmed this goal in its *Intermodal Porting Order*.⁶

³ Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶ 155 (1996), *subsequent history omitted*. ("LNP First Report and Order").

⁴ Telephone Number Portability – CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 95-116, FCC 03-284, ¶ 28 (rel. November 10, 2003), *appeal pending sub nom. United States Telecom Association, et al., v. Federal Communications Commission*, Case Nos. 00-1012, 00-1015, 03-1310, 03-1424 *et al.* (D.C. Cir.) ("*Intermodal Porting Order*").

⁵ See *LNP First Report and Order*, 11 FCC Rcd at ¶ 160.

⁶ See *Intermodal Porting Order*. On November 20, 2003, the FCC rejected a request for stay of the *Intermodal Porting Order* pending judicial review. Telephone Number Portability, United States Telecom Association and CenturyTel of Colorado, Inc. Joint Petition for Stay Pending Judicial Review, *Order*, CC Docket No. 95-116, FCC 03-298 (rel. Nov. 20, 2003). The D.C. Circuit also declined to grant a motion for stay filed by these same parties.

While NEP wants to forestall its intermodal LNP obligations – and thus competitive entry into its service territories – the Petition fails to support the waiver requested. For one, as a matter of law, the Petition does not meet the stringent standards for a Section 52.23(e) waiver of the LNP obligations. Indeed, NEP fails to present any evidence that it is “unable to comply with [the Commission’s] deployment schedule” – the threshold showing under Section 52.23.⁷ Moreover, as a policy matter, any waiver of Petitioner’s intermodal porting obligation past May 24, 2004 will throw into disarray the efforts undertaken by other carriers to implement local number portability by the required dates. Furthermore, any further delay of LNP in the Petitioner’s service areas will disadvantage consumers in those markets – who expect on May 24, 2004 to be able to port their telephone numbers among carriers. Indeed, consumers in NEP’s service territory, like consumers in larger urban areas, *have the legal right under the Communications Act to port their numbers to new carriers should they so desire*. The public interest requires that all carriers that received timely *bona fide* requests for portability implement LNP on May 24.

For these reasons, Nextel opposes the Petitioner’s LNP waiver request and asks the Commission to re-affirm that all carriers have an obligation to port numbers as of May 24, 2004.

II. NEP FAILS TO MEET THE STANDARD OF A SECTION 52.23(E) WAIVER REQUEST.

Section 52.23 of the rules sets forth a strict standard for LNP waiver requests. As a threshold matter, the rule requires that all LECs requesting an LNP extension “demonstrate through *substantial, credible evidence* the basis for its contention that it is unable to comply

⁷ 47 C.F.R. 52.23(e).

with . . . [the Commission’s deadline for implementing a long-term number portability method].⁸

Notably, the Commission interpreted Section 52.23 narrowly and has warned carriers that Section 52.23(e)’s requirements are not easily avoided. At the time the Commission adopted the provision, for example, it specifically stated that “carriers are expected to meet the prescribed deadlines, and a carrier seeking relief must present *extraordinary circumstances* beyond its control in order to obtain an extension of time.”⁹ This interpretation plainly demonstrates that Section 52.23 is not meant to provide carriers with an “easy out” from their LNP obligations. And, carriers seeking a waiver pursuant to that provision must meet a strict evidentiary standard to demonstrate why they cannot implement LNP within the Commission-specified timeframe.

Petitioner utterly fails to meet the Section 52.23(e) waiver criteria. Indeed, the Petitioner cannot even demonstrate the threshold requirement that it is incapable of meeting its LNP obligations. Nor does the Petition show that NEP faces “extraordinary circumstances beyond its control.”¹⁰ According to NEP, for example, it has, “for several years, been planning and

⁸ 47 C.F.R. 52.23(e) (emphasis added). These waiver requests must set forth: (1) The facts that demonstrate why the carrier is unable to meet the Commission’s deployment schedule; (2) A detailed explanation of the activities that the carrier has undertaken to meet the implementation schedule prior to requesting an extension of time; (3) An identification of the particular switches for which the extension is requested; (4) The time within which the carrier will complete deployment in the affected switches; and (5) A proposed schedule with milestones for meeting the deployment date.

⁹ *LNP First Report and Order*, 11 FCC Rcd at ¶ 85 (emphasis added). In the context of explaining the requirements of the CMRS counterpart to the LEC waiver rule – which contains the exact same criteria – the Commission characterizes the criteria as “rigorous,” and has expressed its expectation that the rule will “deter the filing of unsubstantiated and frivolous extension requests.” See *Telephone Number Portability—CTIA Petition for Extension of Implementation Deadlines, Memorandum Opinion and Order*, 13 FCC Rcd 16315, ¶ 11 (1998).

¹⁰ *LNP First Report and Order*, 11 FCC Rcd at ¶ 85.

implementing network upgrades to address expected network capability requirements and the introduction of advanced services.”¹¹ Yet, NEP determined not to upgrade its existing switches, because it would be “inefficient and uneconomical to continue to invest significant capital to upgrade what is, in NEP’s view, antiquated switch technology.”¹² Instead, NEP determined to deploy a software switch technology that it now claims cannot be installed in time to meet the May 24 deadline.

Claims of added cost cannot justify any further delay of the NEP’s LNP obligation. Indeed, CMRS carriers, competitive local exchange carriers and other ILECs have had to expend hundreds *of millions of dollars* to upgrade and prepare their networks for LNP. Moreover, the fact that NEP could have upgraded its existing switches, but chose not to, demonstrates that Petitioner is capable of implementing LNP. NEP, however, made a “business decision” to ignore the Commission’s porting obligation and file an unsubstantiated waiver petition – a choice that should not be rewarded by the Commission.

Moreover, NEP has offered no credible explanation as to why it waited so long to confer with its switch vendor, Taqua Inc., to establish the schedule for implementation. Rather, NEP states that “[u]ntil the Commission’s intermodal number portability order in November of 2003, NEP did not expect that intermodal porting would be an imminent requirement, given that the geographic service area disparity between wireline and wireless carriers remained an unresolved issue.”¹³ Thus, *NEP waited until after the November 10 Intermodal Porting Order was released to review its*

¹¹ Petition at 2.

¹² *Id.*

¹³ *Id.* at 4.

plans with Taqua.¹⁴ Such failure to acknowledge the Commission's porting requirement, however, is insufficient to support a waiver of the May 24 deadline. Indeed, all carriers, including NEP, have been on notice of their intermodal porting obligations since 1996 and have had ample time to upgrade networks to comply with the FCC's rules.¹⁵ Thus, any coordination with NEP's switch vendor should and ***could*** have been completed well in advance of the upcoming May 24 deadline. The Petitioner simply cannot rely on the lack of time or notice to justify any further delay in LNP implementation.

What is plain from the Petition is not that NEP cannot implement LNP by the May 24 deadline, *but rather that it does not want to implement LNP* based on the costs associated with upgrading its existing switches. Indeed, the Petition on its face reveals a conscious choice by NEP to avoid compliance with the Commission's LNP deadline by delaying the necessary upgrades to its network. This is an inadequate showing under Section 52.23, which requires Petitioner to demonstrate that it is *unable* to meet the Commission's deployment schedule,¹⁶ or that "extraordinary circumstances beyond [its] control"¹⁷ prevent it from achieving LNP-capability. The everyday business decisions described in the Petition are quite *ordinary* and solidly *within* NEP's control. Moreover, claims of added cost simply cannot suffice as justification for waiver. The Commission must not reward Petitioner for engaging in dilatory tactics, and should deny the request for waiver.

¹⁴ *Id.*

¹⁵ *See supra* note 3.

¹⁶ 47 C.F.R. 52.23(e)(1) (emphasis added).

¹⁷ *LNP First Report and Order*, 11 FCC Rcd at ¶ 85.

III. THE PETITION SEEKS TO DELAY LNP IMPLEMENTATION TO THE DETRIMENT OF COMPETITION AND CITIZENS RESIDING IN THE RURAL AREAS SERVED BY PETITIONERS.

The overarching public interest supports full compliance with the LNP deadline. Indeed, the purported need for more time plainly delays nationwide LNP implementation to the detriment of competitors and citizens residing in rural markets. As stated above, NEP claims to need an extension due to delays caused by a decision to change its LNP implementation plan – *a decision that could have been made well in advance of the upcoming deadline*, as well as its failure to acknowledge the Commission’s LNP implementation deadline.

The Commission should not allow Petitioner to use its own delay and failure to plan for the requisite network upgrades as a means to achieve a competitive advantage over other carriers, including CMRS providers, who have implemented LNP and who will be unable for the length of the waiver to receive Petitioner’s customers who desire to change their service provider but retain their telephone number. To reward any carrier for such an unaccountable delay when other carriers, like Nextel, have been preparing for years to achieve LNP capability is fundamentally at odds with Commission rules and policy and the interests of rural consumers who, like consumers in larger urban areas, have the legal right under the Communications Act to port their numbers to new carriers should they so desire. Indeed, the Commission recognizes that competition and added choice for rural customers is a positive result of intermodal LNP: “service provider portability will encourage CMRS-wireline competition, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services.”¹⁸ As stated above, the Commission reaffirmed this goal in its *Intermodal Porting Order*.

¹⁸ See *id.* at ¶ 160.

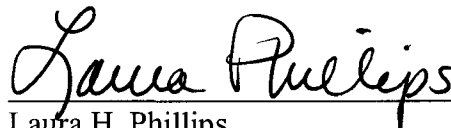
Rural consumers should not now be denied this opportunity. Tactics by Petitioner to further delay LNP will disserve consumers in its own markets, who have been told repeatedly, through the press and by Commission outreach programs, that number portability outside the top 100 MSAs will be available by May 24, 2004. On this basis, as well as Petitioner's failure to meet the requirements of §52.23(e), the Petition must be denied.

IV. CONCLUSION.

The Petition is nothing more than an attempt to delay the full scope of the Petitioner's intermodal porting obligation so it can obtain a competitive advantage over other carriers. The Petition is fundamentally at odds with Commission rules and policy and the interests of rural customers who have the legal right under the Communications Act to port their numbers should they so desire. As such, the Commission should deny the Petition for Waiver.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.



Laura H. Phillips

Laura S. Gallagher

DRINKER BIDDLE & REATH LLP

1500 K Street, N.W., Suite 1100

Washington, D.C. 20005-1209

Its Attorneys

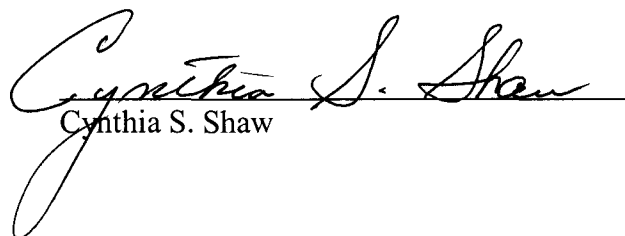
Kent Nakamura
*Vice President, Deputy General Counsel –
Regulatory*
Robert McNamara
Senior Counsel – Regulatory
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191

April 9, 2004

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 9th day of April, 2004, a copy of "**NEXTEL COMMUNICATIONS, INC. COMMENTS**" was mailed via first class mail to the following:

Sylvia Lesse, Esq.
Kraskin, Lesse & Cosson, LLC
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
Counsel for North-Eastern Pennsylvania Telephone Company


Cynthia S. Shaw